Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32699
Docket No. MW-31797
98-3-94-3-68

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside concern (Haley Construction Company) to remove, load and haul scrap material from the load test track and the wrecker storage tracks at the Roundhouse in Nashville, Tennessee on August 23 through October 11, 1992 [System File 13(118) (92)/12(93-23) LNR].

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out said work in accordance with Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operator R. W. Hailey, Truck Driver T. W. Anderson and Track Laborer B. R. Sissom shall each be allowed eight (8) hours' pay at their respective rates of pay for August 23 through October 11, 1992."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

As developed on the property, the claim alleges that the Carrier, without prior written notice to the Organization, contracted with an outside concern (Haley Construction Company) to haul off and dump scrap track materials, including old ties, plates, spikes and ballast from certain tracks at the Roundhouse in Nashville, Tennessee. On the property, the Carrier initially asserted that Claimants were employed and unavailable; the Organization was notified of the Carrier's intent to contract out the work; and that the Carrier's employees removed material, but the material removed by the contractor was limited to contaminated items. Further progressing of the claim on the property followed those same basic positions, with the Carrier repeatedly stating that the Organization was given written notice and the Organization denying that assertion. With respect to the notice the Carrier asserts was sent to the Organization, that notice was not produced. As the dispute further progressed, the Carrier also added to its position that the hauling of scrap material was not work exclusively held by the Organization.

This claim will be sustained.

First, Article IV of the 1968 Agreement requires that "[i]n the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman . . . in writing . . . not less than 15 days prior

thereto." While the Carrier repeatedly asserted that written notice was given to the Organization, the Organization contended the contrary. At no time during the handling of this dispute was the notice the Carrier asserts it sent the Organization presented. Having alleged that it sent the notice, the Carrier had the obligation to produce it. That was not done. We find notice was not sent.

Second, it is not necessary for the Organization to demonstrate exclusivity of performance of the specific work in dispute in order to be entitled to notice under Article IV. See Third Division Award 31777 between the parties where failure to give notice of subcontracting in the face of a "colorable claim" by the employees to the work in dispute resulted in a sustaining award. ("The Carrier's reference to the Organization's need to prove its 'exclusive' right to the work has been repeatedly found inappropriate in reference to contracting claims.") In this case, given the type of debris that was removed, the employees' claim to the disputed work was more than a "colorable" claim that the work fell "within the scope of the . . . agreement" thus entitling the Organization to written notice under Article IV.

Third, the Carrier's assertions that the material removed by the contractor was contaminated requiring special handling and was not of the type previously removed by the employees is not persuasive in this case. See Third Division Award 30977 between the parties. ("Whether 'specialized tools and equipment' were in fact necessary for these particular projects is a matter which Carrier could have and should have explored with the General Chairman in the good faith discussions required by Article IV and the December 11, 1981 Agreement.") Third Division Award 31005 cited by the Carrier does not change the result. The dispute in that case did not involve the failure of the Carrier to give notice.

Fourth, the fact that Claimants were working during the time covered by the claim does not deprive them of a remedy in this case. As a result of the Carrier's demonstrated violation, Claimants lost work opportunities and shall be made whole. The claim seeks payment at the straight time rate. That relief shall be granted. However, Claimants shall only be compensated for the number of hours of work performed by the contractor's employees during the time covered by the claim.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of August 1998.